Thian Oon Kin v Rekarya Consultant Group & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S6-P22–6 OF 1986
HARMINDAR SINGH JC
27 MAY 2009

Civil Procedure — Pleadings — Defence — Failure to submit variance in payment of monies for work done — Whether defendant could deny payment for plaintiff not part company contracted to undertake project

Contract — Parties — Enforceability of agreement — Whether monies paid to company be paid to plaintiff by virtue of continued partnership of another company

The plaintiff opened an architectural firm known as Leong Thian & Rakan-Rakan ('LTR') with one Leong Kwai Choy. LTR was appointed as one of the consultant architect by Permas Jaya Sdn Bhd ('Permas Jaya') for a project. Subsequently, LTR was sold to the second defendant company ('Bio-Arch'). The plaintiff and Leong Kwai Choy, who both were the only shareholders of Bio-Arch, received cash and shares from the sale which were equally divided between themselves. Another partner was admitted into Bio-Arch with each partner having one third shares in Bio-Arch. Later, the partners of Bio-Arch went on to set-up Rekarya Consultant Group, the first defendant company with another partner. However, the plaintiff withdrew as a partner of the first defendant company and signed a deed of withdrawal ('the deed') which entitled the plaintiff to receive, inter alia, claims in respect of the project related to Permas Jaya. The first defendant argued that it was not liable to pay as it never received any monies from Permas Jaya as the payment vouchers submitted by Permas Jaya showed monies were paid only to LTR. It was submitted further that the first defendant, Bio-Arch and LTR were not made up of the same persons as partners and therefore were separate legal entities.

Held, allowing the appeal:

(1) In the deed of withdrawal, the first defendant had agreed to pay the plaintiff, fees from the Permas Jaya project in contrast with the situation when LTR was the consultant architect and which should be receiving the payments. The evidence adduced at the trial showed that payments were made by Permas Jaya but were made to LTR. Hence, the continuing partners of the first defendant agreed to do so knowing very

well that payments from Permas Jaya project were channelled to the first defendant. This is reflected by the intention of the parties and consistent with what was set out in the deed of withdrawal (see paras 11–12).

(2) The intention of the parties was clear from the amended defence submitted by the first defendant. The first defendant did not offer any explanation as to the reason the first defendant was receiving the payment from Permas Jaya when the consultant architect was LTR, hence, the claim made by the first defendant was clearly at variance with its pleaded defence (see paras 13–14).

(3) Since payments were made by Permas Jaya on the Permas Jaya project, the plaintiff is entitled to his dues in accordance to the deed of withdrawal (see para 19).

[Bahasa Malaysia summary

Plaintif telah membuka firma arkitek yang dikenali sebagai Leong Thian & Rakan-Rakan ('LTR') bersama dengan Leong Kwai Choy. LTR telah dilantik menjadi salah seorang perunding arkitek oleh Permas Jaya Sdn Bhd ('Permas Jaya') untuk sebuah projek. Selepas itu, LTR telah dijual kepada syarikat defendan kedua ('Bio-Arch'). Plaintif dan Leong Kwai Choy, yang keduanya merupakan pemegang tunggal syer di Bio-Arch, menerima tunai dan bahagian daripada jualan yang telah dibahagikan sama rata antara mereka. Seorang lagi rakan kongsi telah diterima masuk ke dalam Bio-Arch dengan setiap rakan kongsi mendapat satu pertiga syer Bio-Arch. Kemudian, semua rakan kongsi di Bio-Arch telah membentuk Rekarya Consultant Group, satu syarikat milik defendan pertama dengan rakan kongsi yang lain. Walau bagaimanapun, plaintif menarik diri daripada menjadi rakan kongsi syarikat milik defendan pertama dan menandatangani surat ikatan penarikan ('surat ikatan') yang membolehkan plaintif untuk menerima, antara lain, tuntutan-tuntutan bagi projek berkaitan dengan Permas Jaya. Defendan pertama menghujahkan bahawa ia tidak bertanggungan untuk membayar kerana ia tidak pernah menerima sebarang wang daripada Permas Jaya memandangkan baucar pembayaran yang dikemukakan oleh Permas Jaya menunjukkan wang cuma dibayar kepada LTR. Dihujahkan lagi bahawa defendan pertama, Bio-Arch dan LTR bukan terbentuk dari orang-orang yang sama sebagai rakan kongsi dan oleh itu, merupakan entiti perundangan yang berbeza.

Diputuskan, membenarkan rayuan:

(1) Di dalam surat ikatan penarikan diri, defendan pertama telah bersetuju untuk membayar plaintif, fi daripada projek Permas Jaya berbeza dengan situasi ketika LTR merupakan perunding arkitek dan sepatutnya mendapat bayaran. Bukti yang dikemukakan semasa

perbicaraan menunjukkan pembayaran dibuat oleh Permas Jaya tetapi dibuat kepada LTR. Dengan ini, rakan kongsi berterusan defendan pertama bersetuju berbuat sedemikian, dengan pengetahuan bahawa bayaran daripada projek Permas Jaya disalurkan kepada defendan pertama. Ini digambarkan oleh niat pihak-pihak yang konsisten dengan apa yang termaktub di dalam surat ikatan penarikan (lihat perenggan 11–12).

(2) Niat pihak-pihak adalah jelas daripada pembelaan terpinda yang diserahkan oleh defendan pertama. Defendan pertama tidak mengemukakan sebarang penjelasan mengapa ia menerima pembayaran daripada Permas Jaya sedangkan LTR merupakan perunding arkitek dan oleh itu, tuntutan yang dibuat defendan pertama adalah bercanggah dengan pliding pembelaan (lihat perenggan 13–14).

(3) Oleh kerana pembayaran dibuat oleh Permas Jaya bagi projek Permas Jaya, plaintif berhak ke atas pembayaran tersebut, seperti yang dinyatakan dalam surat ikatan penarikan (lihat perenggan 19).]

Notes

For cases on defence, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5332–5367.

For cases on enforceability of agreement, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 4674–4676.

Cases referred to

Central Bank of India v Hartford Fire Insurance Co Ltd AIR 1965 SC 1288 (refd)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 CLJ 357, CA (refd)

Mulpha Pacific Sdn Bhd v Paramount Corp Bhd [2003] 4 MLJ 357, CA (refd)

Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd [1990] 2 MLJ 163; [1990] 1 CLJ 995, HC (refd)

M Moghan (Moghan & Co) for the plaintiff.
Jagjit Singh (Melvin Selvam with him) (Jagjit Singh & Co) for the defendant.

Harmindar Singh JC:

[1] This case arises out of a dispute between partners of an architectural firm. The plaintiff is an architect. The first defendant is an architectural firm. The claims against the other three defendants were either withdrawn or struck out prior to the trial. The plaintiff claims from the first defendant monies received from the Permas Jaya project in Johor Bahru pursuant to a deed of withdrawal dated 18 December 1984. The first defendant is denying any liability to pay.

[2] I should mention at the outset as background material that the evidence of the plaintiff was heard and recorded by the preceding judge. The trial was then fixed before me for continued hearing on 29 April 2009. To the credit of the parties, the evidence from the rest of the witnesses was completed on that day. From the evidence of all the witnesses, the following facts emerged. On 1 October 1972, the plaintiff and one Leong Kwai Choy ('Leong') started an architectural firm known as Leong Thian & Rakan-Rakan ('LTR'). In 1975, LTR was appointed by Permas Jaya Sdn Bhd as the consultant architect together with five other firms within a consortium in respect of a project for a new township in Mukim Plentong, Johor Bahru known as Bandar Baru Permas Jaya.

[3] On 11 February 1980, the plaintiff and Leong sold LTR to Bio-Arch Sdn ('Bio-Arch') for the sum of RM500,000 in the form of cash and shares in Bio-Arch. The cash and shares were split equally between the plaintiff and Leong. This meant that the plaintiff and Leong were the only shareholders of Bio-Arch.

[4] On 4 October 1983, the plaintiff and Leong brought in Goh Say Tong ('Goh'), now deceased, as new partner and shareholder of Bio-Arch. Eventually, the three of them ended up with 1/3 shareholding each in Bio-Arch.

[5] On 20 July 1984, Permas Jaya Sdn Bhd entered into an agreement to appoint LTR to continue as consultant architect for the same project, that is, phase 1, stages 1 and 2.

[6] On 16 August 1984, the plaintiff, Leong, Goh and one Tuan Hj Abdul Razak bin Hitam ('Razak') decided to form an architectural partnership under the name and style of Rekarya Consultant Group, the first defendant in this case.

[7] On 18 December 1984, the plaintiff withdrew as a partner and signed a deed of withdrawal ('deed'). Now what was the plaintiff entitled to receive under the terms of this deed? It can be summarised as follows:

(a) RM30,000 upon execution of the deed.

(b) 60% of the net fees, that is, RM76,200 receivable from Permas Jaya Sdn Bhd in respect of phase 1, stage 1.

(c) 60% of amount recovered from Jururancang Bersekutu less legal expenses.

(d) 60% of the net fees, that is, RM144,000 receivable from Permas Jaya Sdn Bhd in respect of phase 1, stage 2 of the Permas Jaya project.

(e) The whole fees of RM27,183.99 earned from the Stadium Negara project.

[8] Only the claims in respect of the Permas Jaya project are in dispute. Why is the first defendant refusing to pay the plaintiff? In a nutshell, the first defendant is claiming that they are not liable to pay as the first defendant 'never received any monies from Permas Jaya'. They also submit that according to the payment vouchers submitted by Permas Jaya Sdn Bhd, whatever monies paid went to LTR and not the first defendant. It was further submitted that the first defendant, Bio-Arch and LTR were not made up of the same persons as partners as the plaintiff was claiming and were therefore separate legal entities.

[9] The first defendant had also earlier counterclaimed against the plaintiff for acts of negligence but decided not to pursue this at the trial.

[10] Now it is of course trite that in construing a particular document, the duty of the court is to give effect to the bargain of the parties. This is to be done by considering their intention. If the agreement is in writing, then the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If the words are clear, the court must give effect to the plain meaning of the words however much it may dislike the result (*Central Bank of India v Hartford Fire Insurance Co Ltd* AIR 1965 SC 1288 and approved in *Mulpha Pacific Sdn Bhd v Paramount Corp Bhd* [2003] 4 MLJ 357 (CA) and *Royal Selangor Golf Club v Anglo-Oriental (Malaysia) Sdn Bhd* [1990] 2 MLJ 163; [1990] 1 CLJ 995).

[11] At first glance, there is something terribly odd about the terms stated in the deed of withdrawal if what the first defendant is saying is right. In the deed, the first defendant had agreed to pay the plaintiff fees from the Permas Jaya project. Now why would they do that when it was actually LTR who was the consultant architect and who should be receiving payment.

[12] The evidence adduced at the trial showed that payments were made by Permas Jaya Sdn Bhd but these were made to LTR. I can only think that the continuing partners of the first defendant agreed to do so because they knew very well that payments from the Permas Jaya project were going to be channelled to them. That, in my view, would have been the true intention of the parties and consistent with what was set out in the deed of withdrawal.

[13] This take of the intention of the parties can be further seen from the amended defence of the first defendant dated 12 August 1997. What sounds very much like an admission to me is para 7B of the statement of defence which reads:

> The First Defendant avers that the last payment received from M/s Permas Jaya Sdn Bhd was in November 1983 totalling a sum of RM488,480.04 which payments ceased owing to the Nation wide recession affecting inter alia the Building and Constructions Sectors.

[14] This is a clear admission that the first defendant was receiving payments from Permas Jaya Sdn Bhd. Again, the pertinent question is why is the first defendant receiving payments when the consultant architect was LTR? No explanation was offered by the first defendant. To my mind, this was compelling evidence that payments meant for LTR were going into the pockets of the continuing partners of the first defendant. There is nothing sinister in this. Except that the first defendant cannot now deprive the plaintiff of the fruits of his labour as agreed and set out in the deed of withdrawal.

[15] It did not elude me as well that the case that the first defendant was trying to make was clearly at variance with their pleaded defence. Having admitted to receiving payments from Permas Jaya Sdn Bhd, it was now not open to the first defendant to deny the same. In fact, the first defendant's stance that no monies were received by them is not only not pleaded but the contrary is admitted. In tennis parlance, this really should be game, set and match over for the first defendant.

[16] On the issue of pleadings, the decision in *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357 is instructive. Speaking for the Court of Appeal, Gopal Sri Ram JCA (as he then was) held:

> Now, it is a cardinal rule of pleading that a defendant to an action for breach of duty — whether in contract or tort — may properly deny liability and require the plaintiff to prove his or her claim. But once a defendant takes that course, he must stand or fall on his pleaded case. He cannot simultaneously put forward an unpleaded case of justification for his conduct.

[17] For these reasons, the contention of the first defendant must fail.

[18] So what is the amount to be paid by the first defendant to the plaintiff? That there were substantial payments by Permas Jaya Sdn Bhd for the project was not in dispute, except that the payments were made to LTR. It cannot now be determined with precision as to the exact amounts paid due to the significant lapse of time since the payments were made.

[19] The best evidence here is that of a senior manager of Permas Jaya Sdn Bhd (SP2) who testified that from his calculations, a total sum of

RM461,446.07 was paid by Permas Jaya Sdn Bhd to LTR between 15 February 1985 and 4 September 1986. His evidence was supported by the payment vouchers entered into evidence. This amount paid was slightly in excess of the amounts stated to be due under the deed of withdrawal which was RM447,000. Since payments were made by Permas Jaya Sdn Bhd on the Permas Jaya project, the plaintiff is therefore entitled to his dues under the deed of withdrawal which was stated as RM220,200.

[20] In the circumstances, judgment is entered for the plaintiff against the first defendant for the sum of RM220,200 together with interest at 8%pa from the date of the writ of summons until realisation. The plaintiff is also entitled to costs. Since the counterclaim was abandoned, there will be no order on the same.

Appeal allowed.

Reported by Mashrifah Ravendran